

COPY

At a term of the Supreme Court held in and for the County of Columbia, in the City of Hudson, New York, on the 6th day of January 2010.

PRESENT: HON. PATRICK J. McGRATH
SUPREME COURT JUSTICE

SUPREME COURT STATE OF NEW YORK
COUNTY OF COLUMBIA

THE GRANGER GROUP, STONE MOUNTAIN *
BROTHERS I, LLC, GEORGE BARIMO, BEN *
SHECTER, SALI WOHLBACH, ANNE G. *
HOFFMAN, LEON HOFFMAN, DIANE * DECISION AND ORDER
RODRIGUEZ, JOSE RODRIGUEZ, MARY *
BARTLETT, GEORGE BARTLETT and *
CHRISTINA WING, *
Plaintiffs, * INDEX NO. 6155-09
RJI NO. 10-09-0174

-against- *

TOWN OF TAGHKANIC, TOWN OF TAGHKANIC *
ZONING BOARD OF APPEALS, TOWN OF *
TAGHKANIC PLANNING BOARD, ALAN WILZIG*
and, DENNIS CALLAHAN, AS CODE *
ENFORCEMENT OFFICER AND BUILDING *
INSPECTOR FOR THE TOWN OF TAGHKANIC, *
Defendants. *

In the Matter of the Application of *

THE GRANGER GROUP, STONE MOUNTAIN *
BROTHERS I, LLC, GEORGE BARIMO, BEN *
SHECTER, SALI WOHLBACH, ANNE G. *
HOFFMAN, LEON HOFFMAN, DIANE * INDEX NO. 6295-09
RODRIGUEZ, JOSE RODRIGUEZ, MARY * RJI NO. 10-09-0215
BARTLETT, GEORGE BARTLETT and *
CHRISTINA WING, *
Petitioners/Plaintiffs, *

In a Proceeding Pursuant to Article *
78 of the CPLR *

-against- *

TOWN OF TAGHKANIC PLANNING BOARD, *
ALAN WILZIG and KARIN WILZIG, *

Respondents/Defendants. *

In the Matter of the Application of *

THE GRANGER GROUP, STONE MOUNTAIN *
BROTHERS I, LLC, GEORGE BARIMO, BEN *
SHECTER, SALI WOHLBACH, ANNE G. *
HOFFMAN, LEON HOFFMAN, DIANE *
RODRIGUEZ, JOSE RODRIGUEZ, MARY *
BARTLETT, GEORGE BARTLETT and *
CHRISTINA WING, *

INDEX NO. 6592-09
RJI NO. 10-09-0313

Petitioners/Plaintiffs, *

In a Proceeding Pursuant to Articles *
78 and 30 of the CPLR *

-against- *

ZONING BOARD OF APPEALS OF THE TOWN *
OF TAGHKANIC, TOWN OF TAGHKANIC *
PLANNING BOARD, TOWN OF TAGHKANIC, *
ALAN WILZIG, KARIN WILZIG and, *
DENNIS CALLAHAN, AS CODE ENFORCEMENT *
OFFICER AND BUILDING INSPECTOR FOR *
THE TOWN OF TAGHKANIC, *

Respondents/Defendants. *

APPEARANCES: WARREN S. REPLANSKY, ESQ.
For the Petitioners

JOHN J. HENRY, ESQ.
ROBERT J. FITZSIMMONS, ESQ.
MALCOLM McPHERSON, ESQ.
For the Respondents

McGRATH, PATRICK J. J.S.C.

Petitioners commenced these proceedings seeking: a declaratory judgment that a one mile long motorcycle track on Respondent Alan Wilzig's (hereinafter "Wilzig") property is not a permitted use under the Town of Taghkanic Zoning Ordinance; an order enjoining Respondent Dennis Callahan, the Code Enforcement Officer and Building Inspector for the Town of Taghkanic ("CEO"), from issuing a building permit, certificate of compliance and/or certificate of occupancy to Wilzig for construction and use of a motorcycle track on his property; and an order enjoining Wilzig from constructing operating, maintaining and using a motorcycle track on his property. Petitioners also seek to annul and vacate the determination of the Respondent Town of Taghkanic Planning Board to issue a Negative Declaration and grant Site Plan approval to Wilzig. Finally, Petitioners seek to: annul and vacate the determination of the Respondent Zoning Board of Appeals of the Town of Taghkanic dated June 23, 2009; a declaration that the proposed sporting course on Wilzig's property does not constitute a legal and valid accessory use to a residential property in the Town of Taghkanic; a declaration that any determination of the CEO that the proposed course constitutes a recreation or other legal use under the Town of Taghkanic Zoning Ordinance is null and void; an order directing the Planning Board to revoke any Site Plan, or other approvals, granted to Wilzig for the construction, maintenance and use of the course on his property; and a declaration that certain Local Laws of the Town of Taghkanic are null and void, and unconstitutional, and ordering the Town of Taghkanic to refund to the Petitioners all sums paid by Petitioners in conjunction with the ZBA appeal. Respondents submitted Affidavits in Opposition to all three actions, Petitioners submitted Replies, and the Town of Taghkanic Planning Board ("Planning Board") submitted a Sur Reply on the second action.

FACTUAL HISTORY

In 2005, Wilzig purchased property containing approximately 240 acres of land at 450 Post Hill Road in the Town of Taghkanic. Around June of 2006, Wilzig commenced construction of a track or course on his property. The course was approximately one mile in length and 30 feet in width. The track was substantially completed by Wilzig without official Town approval. The only thing that remained to complete the track was paving. Wilzig also expressed an interest in constructing a 12000 square foot metal storage building to store his collection of 100 classic motorcycles, as well as family cars, farm equipment, tools and

other personal and family items.

On July 12, 2006, the respondent, Dennis Callahan, as Zoning and Code Enforcement Official for the Town of Taghkanic, issued an order to remedy violation to Wilzig in connection with construction of the track. The violation was of the Town of Taghkanic Zoning Ordinance. The section violated was "Section III Use Regulations". The character of the violation was "construction of a raised track on premises in violation of the Town of Taghkanic Use Regulations". Section III of the Zoning Ordinance of the Town of Taghkanic lists all allowable uses. Included in Section III is accessory use and club or recreation use. Before listing all allowable uses Section III notes that "uses not permitted by right or as a conditional use whether listed below or not are prohibited".

On August 25, 2006, Wilzig submitted an appeal to the Zoning Board of Appeals ("ZBA") regarding the July 12, 2006, order to remedy violation issued by Dennis Callahan. Wilzig's appeal sought interpretation of the Zoning Law, specifically, it presented the following questions:

- (1) Does the use of the premises for private storage and riding of motor cycles on a newly constructed sport track constitute an accessory use to a single family dwelling?
- (2) Does the Zoning Law permit additional residential structures accessory to a principle single family dwelling? (Page 1 Zoning Board of Appeals Findings and Resolution December 18, 2006)

The ZBA referred the matter to the Taghkanic Planning Board for consideration, on or about October 10, 2006. As to the matter of the sporting track, the Planning Board deferred determination to the Zoning Board of Appeals, and as to the matter of the accessory residence, the Planning Board recommended subdivision of the parcels (Page 2 Findings and Resolution Zoning Board of Appeals December 18, 2006). The ZBA issued a final decision on December 18, 2006, finding that a "paved private sporting track or motorcycle racing track, consisting of a 30 foot +/-, one mile long track +/-, with associated structures for storage of motorcycles, repair of motorcycles, fuel for motor vehicles and incidental structures as designed and represented by the applicant Alan Wilzig, does not qualify as an Accessory Use pursuant to the Zoning Law of the Town of Taghkanic".

On January 19, 2007, Wilzig filed an Article 78 proceeding in Supreme Court challenging the ZBA's decision of December 18, 2006. Subsequent to the filing of the Article 78 petition against the ZBA, Wilzig, by stipulation dated June 18, 2007, amended the petition to add the Town Board of the Town of Taghkanic as a respondent-defendant and converted the Article 78 petition to a Hybrid Article 78/Declaratory Judgment action in which he not only challenged the determination of the ZBA but in which he sought a judgment "declaring that the Zoning Ordinance of the Town of Taghkanic (the 'Zoning Ordinance') does not prohibit a sport track or private motorcycle use on Wilzig's 180 acre parcel of residential property" (Paragraph 1 of Verified Amended Petition and Complaint). By decision dated September 17, 2007, Acting Supreme Court Justice Hummel upheld the ZBA's determination that the racetrack was not an accessory use. Judge Hummel also stated that, "as has already been discussed, failure to list a sports track as a use for which a special permit may be obtained is notice that such a use is not permitted". Wilzig appealed Judge Hummel's decision to the Appellate Division, Third Department but it was dismissed for want of prosecution.

At some point before Judge Hummel's decision was issued and while the appeal was pending, Wilzig applied for a building permit on the metal storage building he proposed to build. On May 1, 2007, the CEO issued a building permit for the storage building and on June 18, 2007, the petitioners appealed to the ZBA on the issue of the permit for the storage building. On July 13, 2007, Wilzig submitted a letter that the building was just an accessory to his residential property and that it was not related to the track. On September 1, 2007, the ZBA dismissed the petitioners appeal as untimely and did so without a hearing. The ZBA also determined, without findings, that the building is an accessory use to the residential property. The petitioners appealed this decision to the Supreme Court. While the appeal was pending, Wilzig and the petitioners entered into a stipulation where they agreed that no certificate of occupancy for the building would be issued until the court made its determination. The stipulation, which was not dated, provided in pertinent part that it was intended to preserve the status quo during the pendency of the action with regard to the issuance of a certificate of occupancy, but shall not stay the construction of the storage building if Wilzig determines to move forward with construction. The petitioners never obtained an injunction to stop construction of the storage building while the case was pending and Wilzig substantially completed construction. On May 1, 2008, Judge Hummel issued a decision on the storage building permit and stated that the ZBA erred in dismissing the appeal by the petitioners and was wrong in determining the building as an

accessory use, however, he declared the issue as moot because the storage building was substantially completed. Petitioners appealed the decision to the Appellate Division, Third Department, and on May 14, 2009, the court affirmed the decision by Judge Hummel based on laches.

In the fall of 2008, Wilzig claims he informally spoke to the CEO, Dennis Callahan, and that the Town CEO advised him that a paved sporting course was a recreational use under the Town Zoning Ordinance and a site plan approval was required from the Town's Planning Board. On October 31, 2008, Wilzig applied for a building/use permit for a "sporting course for motorcycle, bicycle, jogging, skateboarding rollerblading, etc.". On the same date, the CEO denied Wilzig's request and the reason for his denial was "recreation use permitted but required site plan approval by Planning Board". However, Wilzig had already applied to the Planning Board on October 29, 2008, for site plan review to "pave a recreational sporting course" and submitted an agricultural data statement in conjunction with his application that stated, "construction of a paved recreational sporting track approximately 0.95 miles long and 40- feet wide". Wilzig also filed a Short Environmental Assessment form with the Planning Board that described the proposed action as "paving existing private gravel roadway".

On November 18, 2008, the Planning Board established its intent to act as lead agency for the SEQRA review process and in December 2008, an expanded environmental assessment report was submitted to the Planning Board. Extensive review was conducted on the environmental effects of the proposed racetrack.

On December 1, 2008, the petitioners appealed the CEO's decision to refer the matter to the Planning Board as a "recreation use" to the ZBA. In accordance with the zoning ordinance of the Town, the ZBA referred the issue on appeal to the Planning Board for review and comment. (Page 1 ZBA decision June 23, 2009). By letter dated December 26, 2008, John A. Roberts, as Planning Board Chairman advised the ZBA Chairman James Romaine, "It is the opinion of the Planning Board that Mr. Callahan is correct in his decision to issue the permit for a recreational use, pending Site Plan Review by the Town of Taghkanic Planning Board".

On April 13, 2009, the Town Planning Board issued a negative declaration under SEQRA for Wilzig's application and granted final site plan approval for the paved course. The Planning Board imposed several conditions upon their site plan approval as set forth in letters A through P of the resolution. The

conditions, times of operation, dates of operation, allowable noise levels, monitoring of noise levels, number of motorcycles allowed at one time, required exhaust and muffler equipment, and continual periods of use all related to motorcycle use on the track.

On April 17, 2009, petitioner commenced an Article 78/Declaratory Judgment action against the Town of Taghkanic, Alan Wilzig, and Dennis Callahan. By Order to Show Cause dated April 28, 2009, this court issued a temporary restraining order. By decision dated June 1, 2009, this court granted petitioners request for a preliminary injunction and directed that the petitioners join the ZBA and Planning Board as necessary parties to their proceeding.

On June 23, 2009, the Zoning Board of Appeals denied petitioners appeal and affirmed the determination by Dennis Callahan, Zoning and Code Enforcement Officer of the Town of Taghkanic that the proposed sporting course qualifies as a recreational use.

Petitioners commenced two additional Article 78 proceedings challenging the Town Planning Board's April 13, 2009, site plan approval and the ZBA's denial of the appeal of Dennis Callahan's determination that the proposed sporting track qualified as a recreational use. In September 2009, by stipulation and order all three proceedings were consolidated.

LEGAL ARGUMENTS

Respondents allege that petitioners lack standing to challenge the actions of the Code Enforcement Officer, the Town Planning Board, and the ZBA. The individual petitioners are individuals who own property and/or reside either adjacent, or in close proximity to the Wilzig property. In zoning matters particularly, standing should be liberally construed so that land use disputes are resolved on their own merits rather than by preclusive restrictive standing rules (Matter of Douglaston Civic Assn. v Galvin, 36 NY2d 1, 5). The petitioners need to demonstrate that they are aggrieved persons by showing that they will suffer an injury that is in some way different in kind of degree from that of the general public and that the interests they seek to protect are a proper concern of zoning laws (Rosch v Town of Milton, ZBA, 142 AD2d 765 [3d Dept. 1988]). The individual petitioners have established that their property is close enough to the subject parcel that they may be affected more

than the public generally. Further, the interests that the individual petitioners seek to protect concerning the beauty and character of the property, the value of the property, and noise and traffic are appropriate concerns of zoning laws (see, Matter of Tuxedo Conservation & Tax Payers Assn. the Town Board, 69 AD2d 320, 324). The same petitioners were found to have standing in Justice Hummel's decision of May 1, 2008. Justice Hummel found that "several members of the 'Granger Group' are landowners whose property abuts, sits across from and in view of, or is otherwise in close proximity to Wilzig's property".

Petitioners claim that the respondents are barred from further action in connection with the racetrack based upon the doctrine of res judicata. Respondents claim that res judicata is not applicable since Wilzig in his 2006 appeal to the ZBA only raised the issue of accessory use and not club or recreational use. Respondents also argue that there are changed circumstances from Wilzig's appeal to the ZBA in 2006 that precludes the application of res judicata. Finally, respondents argue that res judicata only applies to bar the litigation of "claims" that were or could have been raised in a prior proceeding. They assert there is no second set of claims to be precluded.

The court previously dealt with the issue of "claims" in its decision of July 10, 2009.

Wilzig also argues that because the ZBA determined that res judicata does not apply then the petitioners action is rendered moot.

The doctrine of res judicata prevents a party from relitigating an entire cause of action, and intervenes to foreclose "not only matters litigated, but also those which might have been litigated." NY Practice, Siegel, § 442, citing Schuylkill Fuel Corp v. B.&C. Nieberg Realty Corp., 250 NY 304, 206 [1929] (holding that a "judgment in one action is conclusive in a later one not only as to any matters actually litigated therein, but also as to any that might have been so litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interest established by the first"). "The doctrine of res judicata is designed to put an end to a matter once duly decided. It forbids relitigation of the matter as an unjustifiable duplication, an unwarranted burden on the courts as well as on opposing parties." Siegel, supra. Res judicata will bar the second cause of action "provided that the party to be barred had a full and fair opportunity to litigate any cause of action arising out of the same transaction and the prior

disposition was a final judgment on the merits." Rowley, Forrest, O'Donnell & Beaumont, P.C. v. Beechnut Nut Nutrition Corp., 55 AD3d 982, 984 (3d Dept 2008) (additional citations omitted).

The doctrine of res judicata applies to administrative and quasi-judicial proceedings, such as a ZBA determination after a hearing, as well as judicial proceedings. See Matter of Jason B. v. Novello, 12 NY3d 107, 113 (2009); Kennedy v. Zoning Bd. Of Appeals of the Vill. Of Hastings-on-Hudson, 145 AD2d 490, 491 (2d Dept 1988). Res judicata "precludes the re-presentation of claims which previously were litigated on the merits or might have been litigated at the time." Freddolino v. Village of Warwick Zoning Bd., 192 AD2d 839, 840 (3d Dept 1993) (emphasis added). The doctrine operates to "preclude the renewal of issues actually litigated and resolved in a prior proceeding as well as claims for different relief which arise out of the same 'factual group' or 'transaction' and which should have or could have been resolved in the prior proceeding." Koether v. Generalow, 213 AD2d 379, 380 (2d Dept 1995), quoting Braunstein v. Braunstein, 114 Ad2d 46, 53 (2d Dept 1985) (emphasis added); Charles v. Chase Manhattan Bank, 254 AD2d 321, 321-22 (2d Dept 1998); see also Evans v. Monaghan, 306 NY 312, 323 (1954), citing Osterhoudt v. Rigney, 98 NY 222, 234 (1885) ("[t]he rule which forbids the reopening of a matter once judicially determined by a competent jurisdiction, applies as well to the decisions of special and subordinate tribunals as to decision of courts exercising general judicial powers") (emphasis added).

"Security of person and property requires that determinations in the field of administrative law should be given as much finality as is reasonably possible. [Thus,] the rule of res judicata is applicable to such determinations as well as to courts wherever consistent with the purpose of the tribunal, board of officer (Matter of Evans v Monaghan, 306 NY 312, 323-324 [1954]). The subsequent proceedings are barred by res judicata, whether or not they are judicial or quasi-judicial, as long as there was a prior judicial or quasi-judicial determination. It is only where the first proceeding is not judicial or quasi-judicial that the doctrine of res judicata will not apply to a second proceeding. (see, Matter of Jason B. v Novello, supra, where the Court of Appeals held an administrative decision after a fair hearing was not barred by res judicata since the first administrative determination was not quasi-judicial in nature. The first administrative eligibility decision was not the product of an adversarial proceeding where evidence was received, testimony taken, and arguments and objections made resulting in a record upon which the decision was based). The first administrative proceeding in 2006 under the facts of our case was

clearly quasi-judicial. Wilzigs's appeal to the ZBA in 2006 involved a public hearing, the taking of testimony, presentation of written evidence, questions and comments by the public and board members, and creation of a record for the basis of the ZBA decision. Thus, if Wilzig could have raised the issue of club or recreational use in 2006 before the ZBA then res judicata would bar his subsequent applications to the CEO and Planning Board.

Wilzig's claim that he could not have raised club or recreational use in his 2006 appeal to the ZBA is not supported by the facts or the law applicable to the case. Wilzig was cited by Dennis Callahan for a general violation of Section III of the Zoning Ordinance. Dennis Callahan had indicated in his order to remedy violation that the racetrack on the premises was in violation of the Town of Taghkanic use regulations. This encompassed all uses listed under Section III which included accessory as well as club or recreational use. It was Wilzig who chose to narrow and limit his challenge to the remedy violation to only accessory use as contained under Section III of the Zoning Ordinance. However, Wilzig argues that since club or recreational use required site plan approval by the Planning Board, he could not have raised club or recreational use in his appeal. Wilzig's argument ignores Section VIII (A)(6) of the Town of Taghkanic Zoning Ordinance which recognizes that appeals to the ZBA may require input or approval from the Town Planning Board. Section VIII of the Zoning Ordinance establishes the Zoning Board of Appeals. Section VIII (A)(6) of the Town of Taghkanic Zoning Ordinance provides as follows:

"Referrals to the Planning Board: at least 45 days before the date of hearing held in connection with any appeal or application submitted to the Board of Appeals, said Board shall transmit to the Planning Board a copy of said appeal or application and shall request that the Planning Board submit to the Board of Appeals its advisory opinion on said appeal or application. The Planning Board shall submit a report of such advisory opinion prior to the date of said public hearing. The failure of the Planning Board to submit such report shall be interpreted as a favorable opinion for the appeal or application".

It is clear from Section VIII (A)(6) of the Zoning Ordinance that the Zoning Board of Appeals works in conjunction with the Planning Board on all issues raised in the appellate process

before the ZBA. It recognizes the fact that issues on appeal before the ZBA may involve or require determinations by the Planning Board. The Town Zoning Ordinance does not place any limitations on the issues or claims that may be raised on appeal before the ZBA even those that might require site plan approval by the Planning Board. In both 2006 and 2009, the ZBA referred the issue of the sports track to the Planning Board pursuant to Section VIII (A)(6) of the Town Zoning Ordinance. If Wilzig had raised club or recreational use in the 2006 ZBA appeal that issue would also have been referred to the Planning Board pursuant to Section VIII (A)(6). This is exactly what happened in the 2009 ZBA appeal. The ZBA referred the issue on appeal to the Planning Board for review and comment and the Planning Board advised the ZBA that "Mr. Callahan [the ZEO] is correct in his decision to issue the permit for a recreational use, pending Site Plan Review by the Town of Taghkanic Planning Board" (Page 2 Zoning Board of Appeals findings and resolutions June 23, 2009).

Not only did Wilzig fail to raise club or recreational use in his appeal of 2006 to the ZBA, he also failed to raise the issue in the Article 78/Declaratory Judgment action in Supreme Court. If the reason he failed to raise recreational use before the ZBA was lack of knowledge, that was certainly not the case in his Article 78/Declaratory Judgment action in Supreme Court. The six page findings and resolutions by the ZBA on December 18, 2006, contained comments by the board members. On Page 5 Robert Rochler made the statement "that such a racetrack would fit in the zoning code as a club or recreational use requiring additional permitting and review, rather than as an accessory structure or use". Wilzig possessed this information six months prior to his conversion of the Article 78 proceeding to include a declaratory judgment action against the Town Board. He was free to raise club or recreational use before the Supreme Court and failed to do so even though he had full knowledge and opportunity. If he had raised such club or recreational use before Supreme Court the issue could have been referred back to the Town for further determinations by the Planning Board. Since Wilzig could have raised the issue of club or recreational use before both the ZBA in 2006 and Supreme Court and failed to do so, res judicata bars his subsequent applications to the CEO and Planning Board.

The ZBA's denial of petitioners appeal on June 23, 2009, contained 62 findings. Finding 32 indicated "in our 2006 decision, the ZBA advised the Wilzigs that their proposed sporting course was not an accessory use, but could be considered a recreational use under the Town's Zoning Ordinance subject to site plan approval. In compliance with that direction, the

Wilzigs applied for site plan approval for a recreational sporting course". This court can only conclude that finding 32 dealt with the comment by Board member Rochler as set forth above. All comments by board members contained in both the 2006 and 2009 ZBA decisions are part of the "WHEREAS" paragraphs containing various factual information and assertions considered by the ZBA and not in the resolution paragraphs containing the determination of the entire ZBA. The resolution paragraphs in the December 18, 2006, ZBA decision never held the sporting course to be a recreational use subject to site plan approval. Board member Rochler also made statements contained in the ZBA's decision of June 23, 2009, in the WHEREAS paragraphs. On Page 5 of the decision ZBA board member Rochler indicated "that the Zoning Ordinance states 'uses not permitted by right or as a conditional use whether listed below or not are prohibited' is an error in the law. The statement makes no sense." The resolution adopted by the ZBA in no way incorporated or adopted such opinion by board member Rochler. And for that matter did not adopt by resolution any of the other multitude of individual comments by the other board members.

Both Wilzig and the ZBA argue that res judicata is not applicable since there has been a change in circumstances since Wilzig's 2006 appeal to the ZBA. In Finding No. 31 the ZBA determined in June 23, 2009 that res judicata was not applicable since there had been "major changes to the nature, character and use of the sporting course itself". This is a private road constructed by Wilzig by moving and shaping earth and gravel that was 90 percent complete before the town became involved (Page 3 Expanded Environmental Assessment Report December 2008; Paragraph (11) affidavit of Alan Wilzig May 5, 2009). The only thing that remained to be done in order to complete the course was the paving (Finding (11) ZBA decision June 23, 2009; Planning Board application October 31, 2008). It is clear that the character and nature of the course itself never changed. How can something that is 90% complete change in a major way? It can't and it did not.

Has there been a major change to the use of the sporting course itself? From its inception, the primary purpose and proposed use has been for a motorcycle course. Mr. Wilzig engaged professional engineers and contractors to design the course (Paragraph (9) affidavit of Alan Wilzig May 5, 2009). Its primary use was for Mr. Wilzig to exercise and ride his more than 100 antique and vintage motorcycles. In Mr. Wilzig's own words, "the paved sporting course was designed primarily [emphasis added] to allow me to ride and enjoy one motorcycle at a time from my collection in safety off the public roads" (Paragraph (8)

Wilzig affidavit May 5, 2009). The course is shaped like a "lobster claw" containing approximately nine curves. This special design was for the primary use of motorcycles. The ZBA acknowledged all of the above in Finding (2) on June 23, 2009, by indicating "the paved sporting course was designed primarily [emphasis added] as a private road to allow for the leisurely riding of vintage motorcycles from the Wilzigs personal collection". Substance over form precludes a finding of a major change of use of the motorcycle course by simply adding the words "bicycle, jogging, skateboarding, rollerblading, etc.". These were never mentioned by Wilzig in the 2006 proceeding after the track had already been specifically designed and constructed for motorcycle use. The conditions imposed by the Planning Board for site plan approval of the course all relate to the use of motorcycles. There are no conditions placed on any other use of the course. Also, the fact that other agencies or organizations may have studied the proposed course and issued findings or reports after the 2006 administrative proceeding does not change the fact that it is the same exact motorcycle course that was the subject of the first administrative determination and the primary use is still for motorcycle use. These subsequent studies do not in any way change the fact that Wilzig could have raised club or recreational use in the 2006 ZBA appeal and the Supreme Court declaratory judgment action. "Afterthoughts or after discoveries however understandable and morally forgivable are generally not enough to create a right to litigate anew" (Matter of Reilly v. Reid, 45 NY2d 24, 28). "Though embellished by later events both originate from the identical" track (Smith v. Russell Sage College, 54 NY2d 185, 193). A public road is no less primarily designed for vehicular traffic just because it might also be used by bicycles, joggers, or rollerbladers. So too Wilzig's private road is no less primarily designed for motorcycle use just because Wilzig now claims he or a family member may on occasion ride a bike on it, rollerblade, or jog. There has been no major change of use that would preclude the doctrine of res judicata.

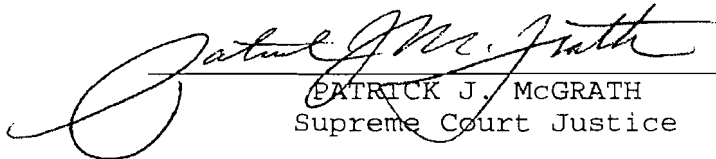
As this court previously decided on July 10, 2009, the ultimate decision regarding res judicata lies with this court, and not the ZBA. Based upon all of the above res judicata prohibits the subsequent claim of club or recreational use which could have been raised in the first proceeding. Therefore, Dennis Callahan's decision that the sports track was an allowable recreational use under the Town's Zoning Ordinance; the Planning Board's April 13, 2009 Site Plan approval; and the ZBA's June 23, 2009 denial of petitioners appeal are annulled and vacated. Petitioners request for a permanent injunction is granted enjoining the Town of Taghkanic, Zoning Board of Appeals of the Town of Taghkanic, Town of Taghkanic Planning Board, Dennis

Callahan as Code Enforcement Officer and Building Inspector for the Town of Taghkanic or any other employee or agent of the Town of Taghkanic from issuing a Building Permit, Certificate of Compliance and/or a Certificate of Occupancy or Site Plan approval for the sporting course or track located on the Wilzig property and Alan Wilzig and Karin Wilzig are permanently enjoined from using, constructing, or completing the sporting course or track in any way or manner as well as any agent, guest, or invitee of Alan or Karin Wilzig.

Petitioners request for a refund of all sums paid in conjunction with the ZBA appeal is denied. The court does not find that the ZBA acted with gross negligence or in bad faith or with malice in making its decision.

This shall constitute the Decision and Order of the Court. This Decision and Order is being returned to the attorney for petitioners. All original supporting documentation is being filed with the Columbia County Clerk's Office. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

DATED: Hudson, New York
January 6, 2010


PATRICK J. McGRATH
Supreme Court Justice

Papers Considered:

Declaratory Judgment Action (#6155-09)

- (1) Summons and Complaint (Warren S. Replansky, Esq.) filed April 17, 2009, with Exhibits A - T annexed;
- (2) Order to Show Cause with Temporary Restraining Order signed by Hon. Patrick J. McGrath on April 28, 2009;
- (3) Affirmation in Support of Motion (Warren S. Replansky, Esq.) dated April 16, 2009;
- (4) Memorandum of Law in Support of Motion (Warren S. Replansky, Esq.) dated April 15, 2009;
- (5) Affirmation in Opposition (Alan Wilzig) dated May 5, 2009;
- (6) Affidavit in Opposition (John J. Henry, Esq.) Dated May 5, 2009, with Exhibits A - H annexed;
- (7) Memorandum of Law in Opposition to Motion (John J. Henry, Esq.) dated May 5, 2009;
- (8) Affidavit in Opposition (Dennis M. Callahan) entered May 5, 2009, with Exhibit A annexed;
- (9) Affirmation in Opposition (Robert J. Fitzsimmons, Esq.) entered May 5, 2009;
- (10) Reply Affirmation (Warren S. Replansky, Esq.) entered May 7, 2009, with Exhibits A - E annexed;
- (11) Reply Affidavit (Diane Rodriguez) entered May 7, 2009, with Exhibits A - B annexed; and
- (12) Amended Summons and Complaint (Warren S. Replansky, Esq.) dated June 4, 2009, with Exhibits A - T annexed;

Planning Board Action (#6295-09)

- (1) Notice of Petition (Warren S. Replansky, Esq.) filed May 14, 2009;
- (2) Verified Petition (Warren S. Replansky, Esq.) dated May 14, 2009, with Exhibits A - U annexed;
- (3) Petitioner's Memorandum of Law in Support of Article 78 Petition (Warren S. Replansky, Esq.) filed May 14, 2009;
- (4) Affidavit in Support of Petition (Kay Castelle) filed May 14, 2009;
- (5) Affidavit in Support of Petition (Christine Tallackson) filed May 14, 2009;
- (6) Town of Taghkanic Planning Board, Record, dated June 22, 2009, Volumes 1, 2 & 3;
- (7) Verified Answer (Malcolm McPherson, Esq.) dated June 30, 2009;
- (8) Affidavit (John Roberts) dated June 29, 2009;
- (9) Memorandum of Law (Malcolm McPherson, Esq.) dated June 24, 2009;
- (10) Verified Answer (John J. Henry, Esq.) dated July 1, 2009;
- (11) Respondents Alan and Karin Wilzig's Memorandum of Law in

- Opposition to the Verified Article 78 Petition (John J. Henry, Esq.) dated July 1, 2009;
- (12) Affidavit in Opposition to Article 78 Petition (John J. Henry, Esq.) dated July 1, 2009, with Exhibits 1 - 5 annexed;
 - (13) Reply Affidavit (Warren S. Replansky, Esq.) dated July 17, 2009, with Exhibits A - D annexed;
 - (14) Sur-Reply (William S. Nolan, Esq.) dated July 23, 2009, with Exhibits A - C annexed;

Zoning Board of Appeals Action (#6592-09)

- (1) Town of Taghkanic Zoning Board of Appeals, Findings and Resolution, dated June 23, 2009;
- (2) Notice of Petition (Warren S. Replansky, Esq.) dated July 1, 2009;
- (3) Verified Petition and Complaint (Warren S. Replansky, Esq.) dated July 1, 2009, with Exhibits A - Q annexed;
- (4) Memorandum of Law in Support of Hybrid Article 78/Declaratory Judgment Action (Warren S. Replansky, Esq.) dated July 1, 2009;
- (5) Amended Memorandum of Law in Support of Hybrid Article 78/Declaratory Judgment Action (Warren S. Replansky, Esq.) dated July 1, 2009;
- (6) Verified Answer (John J. Henry, Esq.) dated August 7, 2009;
- (7) Affidavit (John J. Henry, Esq.) dated August 7, 2009, with Exhibits 1 - 5 annexed;
- (8) Respondents Alan and Karin Wilzig's Memorandum of Law in Opposition to the Verified Petition (John J. Henry, Esq.) dated August 7, 2009;
- (9) Town of Taghkanic Zoning Board of Appeals, Administrative Record, received August 10, 2009, Volumes 1, 2 & 3; and
- (10) Reply Affirmation (Warren S. Replansky, Esq.) dated August 21, 2009, with Exhibits A - F annexed.